In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Petitioners,

VS.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM and CHARLES LAPLANTE,

Respondents.

BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE STATE OF CALIFORNIA

The issues presented by the petitioners fairly comprehend the question of whether the Due Process Clause of the Fourteenth Amendment applies to administrative proceedings to consider the grant or denial of early release of state prisoners on parole.

More than 20,000 persons are incarcerated in California state prisons. The California Community Release Board will conduct approximately 9,600 parole consideration hearings during the 1978-79 fiscal year.

California presently conducts five variations of parole consideration proceedings depending on whether the inmate is under a life sentence, whether his offense was committed before July 1, 1977—the effective date of the new Determinate Sentence Law, and whether he had been granted a parole date under the old Indeterminate Sentence Law. These include serious offender hearings; non-life parole hearings; non-life progress review hearings; life parole hearings, and life progress review hearings.

For all types of parole granting proceedings, California inmates are entitled to review their file, with counsel if they wish, at least ten days before the hearing and are entitled to enter a written response to any material in the file. They receive advance notice of the date of the hearing and of the matters to be considered at the hearing. They are entitled to appear, to ask, to answer, and to have questions answered. They are entitled to speak on their own behalf, and to the presence of a staff person whose purpose it is to insure that all relevant facts are presented, including contradictory assertions of fact not resolved in other proceedings. They are entitled to an unbiased panel, and to challenge panel members for cause. They are entitled to a verbatim record of the proceedings, and to a reasoned written decision. Applicable standards and criteria for parole release and for determination of a release date are published public administrative regulations, adopted under the California Administrative Procedure Act and available to each inmate.

At serious offender hearings, and at life parole consideration hearings every inmate has an unconditional right to counsel, appointed if necessary, in addition to all of the above rights.

Notwithstanding the adoption of procedural features which far exceed the minimum requirements of due process applied by federal decisions in several jurisdictions, a determination by this Court that administrative parole consideration procedures implicate the Fourteenth Amendment could affect California in several important ways.

First, the validity of many thousands of parole release decisions could become clouded, and it may become necessary to adjust the procedures for future parole release proceedings.

Second, the range within which the state executive and the Legislature is able to fashion parole policy in California, and to adjust procedures and standards to implement such policy could be affected by this Court's decision.

Third, each parole consideration proceeding could, in effect, become a "federal case" and the parole consideration process could become burdened with persistent federal litigation initiated by inmates under the Civil Rights Act, Title 42 United States Code, section 1983, to establish additional procedural rights as well as to vindicate noncompliance with specified minimum requirements in particular cases. Such litigation is perceived by plaintiffs and by many courts as free of restraints from requirements of exhaustion of remedies, and is encouraged by the prospect of attorney's fees.

Fourth, the questions of whether and, if so, what process is due at parole release proceedings is now pending in a class action under 42 United States Code, section 1983, brought on behalf of all male felons in prison or on parole

in California. *VanGeldern v. Kerr,* C-72-2088 SAW (United States District Court, Northern District of California).[1] This action started November 1972, and was tried during July and August 1976, but has not yet been decided by the district court. The procedures persistently demanded in the *VanGeldern* case include the absolute right to counsel at all parole release proceedings; the right to call favorable witnesses, to subpoena witnesses, and to confront and cross-examine persons who have given information considered adverse to the inmate. That such litigation persists despite the broad procedural features already afforded in California warrants apprehension of a determination by this Court that due process applies.

In another case, the United States Court of Appeals for the Ninth Circuit has taken an inmate's appeal from denial of habeas corpus which appeal argues that a due process hearing must attend determination of an inmate's minimum eligible parole date. *Salas v. Sumner,* No. 77-3287, United States Court of Appeals for the Ninth Circuit, argued November 6, 1978.

The determination of the issues by this Court will afford guidance to the district court, and to the Court of Appeals, and will affect the positions of the parties in litigation of major statewide significance.

SUMMARY OF ARGUMENT

The putative weight of the private interest involved may not be considered in determining whether due process applies to state parole release proceedings. Only the nature of the interest may be considered. As a state prisoner has

[1]See *Kerr v. United States District Court,* 426 U.S. 394 (1976).

no independent federal right to any foreshortening of his lawful imprisonment, the nature of his interest in parole release must be determined from state law.

The Due Process Clause cannot be implicated by state administrative proceedings which do not jeopardize a person's liberty or property. Specifically, state prisoners who seek the imposition of minimum standards of due process on parole consideration proceedings must establish that state law has conferred a legitimate claim of entitlement to be released on parole, and that this entitlement is in jeopardy at the parole release proceeding. Where state law has not conferred a legitimate claim of entitlement in advance of the parole release hearing, the inmate harbors only a unilateral expectation not comparable to the nature of the private interest jeopardized at a parole revocation proceeding, or even at a parole rescission hearing, and not sufficient to implicate the Due Process Clause.

The decision of whether a lawful period of state imprisonment should be foreshortened by release on parole is a prerogative reserved by the Tenth Amendment. The decision necessarily involves a consideration of state societal interests—including protection of society, punishment, and deterrence. An intent to confer an entitlement to parole in advance of parole consideration hearings would effectively subordinate these interests to other interests, including an inmate's interest in abridgement of his lawful punishment. However necessary it may be to implication of the Due Process Clause, to impute such intent during federal litigation would abridge Tenth Amendment prerogatives unless the intent is expressed with unmistakable clarity in positive state law.

ARGUMENT

THE NATURE OF THE PRIVATE INTEREST AT PAROLE RELEASE PROCEEDINGS DOES NOT SUFFICE TO IMPLICATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Only the Nature of the Interest, and Not the Weight of the Interest May Be Considered.

In determining whether due process applies at all to state administrative parole release proceedings, the Court should confine itself to an appraisal of the nature of the inmate's interest which is at stake and should not consider the weight of the interest. *Board of Regents v. Roth,* 408 U.S. 564, 570-571 (1972). A determination that due process is applicable to a particular administrative proceeding is neither dependent upon, nor required by a finding of grievous loss. *Meachum v. Fano,* 427 U.S. 215, 224-225 (1976); *Moody v. Daggett,* 429 U.S. 78, 88 n. 9 (1976); *Walker v. Hughes,* 558 F.2d 1247, 1250-1251 (6th Cir. 1977).

The decisions below, as well as the decisions of a number of other federal courts, have focused on the putative weight of the inmate's interest, and have abridged prerogatives reserved under the Tenth Amendment in mistakingly characterizing the nature of the inmate's interest.

The Inmate's Interest Must Be A Legitimate Claim of Entitlement.

To invoke the Due Process Clause, the nature of the inmate's interest at parole consideration proceedings must be within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). This Court has indicated that a due process analysis of liberty interests parallels the

accepted due process analysis of property interests. *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974). In *Board of Regents v. Roth, supra,* the attributes of property interests which are protected by the Due Process Clause are described as follows:

> "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 557.

The touchstone of these interests cognizable under the Fourteenth Amendment is ". . . claim of entitlement," a phrase subsequently used by the court in *Moody v. Daggett, supra,* 429 U.S. at 88, n. 9. "Entitlement" has similarly been emphasized in this context in recent well-reasoned opinions of the United States Courts of Appeals for the Seventh Circuit and for the Sixth Circuit. *Solomon v. Benson,* 563 F.2d 339, 342 (7th Cir. 1977); *Walker v. Hughes, supra,* 558 F.2d 1247, 1250-1252 (6th Cir. 1977).

It is this distinction between unilateral expectation and legitimate claim of entitlement which separates the nature of the interest at stake at parole release from the nature of the interest at stake at parole revocation, or even at parole rescission hearings. But the Court of Appeals in this action stated:

> "The nature of the interest at stake in both parole release and parole revocation is the same—conditional liberty versus incarceration—and thus the Fourteenth Amendment applies to both. . . . . Since the protection of the due process clause extends to parolees, it may

not be denied to inmates." Opinion of the Court of Appeals, Appendix pages 7-8.[2]

At this point in its opinion the Court of Appeals describes activities which may be enjoyed by a parolee, as as well the interests of society in not having parole erroneously denied (App., p. 9). Though such statements may describe the weight of the inmate's interest, or an interest of society, they fall short of stating a basis for determining that the inmate enters the parole consideration hearing with a legitimate claim of entitlement to parole release.[3]

Entitlement to Parole Must Be Conferred by State Law.

As state prisoners have no independent federal constitutional or statutory right to a foreshortening of their lawful imprisonment by release on parole, resort must be had to state law to determine whether an inmate enters a parole hearing with a legitimate claim of entitlement to be released on parole. An intent to confer such an entitlement should not be imputed by a federal court unless it is expressed with unmistakable clarity in positive state law.

The establishment and implementation of a process for consideration of whether to foreshorten lawful imprisonment by granting parole is an exercise of legislative and executive prerogatives reserved to the states under the Tenth Amendment to the United States Constitution. In

[2]By appendix we refer to the brown covered single appendix filed in this Court in this action.

[3]The Court of Appeals' observation that society has an interest in not having parole release erroneously denied does not distinguish parole release from any other governmental decision, and does not advance analysis of whether the Due Process Clause is implicated.

fashioning a parole release process state governments take into account state policy and societal interests as well as expectations of inmates. Such societal interests include the protection of society, punishment, and deterrence. If state law is silent, or even ambiguous with respect to entitlement to parole release in advance of administrative parole release proceedings, federal courts should not attempt to fill the void by imputation of an intent to confer such entitlement.[4] To do so would abridge prerogatives reserved to the states under the Tenth Amendment by tipping the balance in favor of the putative interests or expectations of inmates although the state, in fashioning parole release proceedings, may well have perceived state policy in societal interests to be paramount.

In the instant case the Court of Appeals has read Nebraska Revised Statutes, section 83-1, 114 to confer on a state prisoner eligible for parole a right to be released on parole unless he is found unfit for reasons specified in the statute (Opinion of the Court of Appeals, Appendix, page 8). But the Attorney General has stated in the Brief of the Petitioners that this statute ". . . was not intended to vest any rights in the inmates to a parole, but was intended, instead, to constitute instructions to the Board of Parole as to the factors to be taken into account in reaching its decisions" (Brief of Petitioners, page 18). If, as the Nebraska Attorney General asserts, these statutory pro-

[4]Appropos is the observation of a district judge in a similar context: "Much as we would like to rule otherwise, under *Meachum v. Fano* [427 U.S. 215 (1976)], the statute's omission in creating a liberty expectancy to remain in one given juvenile institution compels us to decide that there is no such liberty interest at stake. There is no creation by omission." *Cruz* v. *Collazo*, 450 F.Supp. 235, 239 (D. Puerto Rico 1978).

visions are intended only as guidelines to the parole board, they should not also be taken as an inadvertent conferment upon inmates of an advance entitlement to parole release.

It is also noteworthy that the opinion of the Court of Appeals, in requiring that every inmate receive a formal parole hearing upon first becoming eligible for parole (App., p. 23), would supersede the practice of the Nebraska parole board to grant final or formal parole hearings only after an exercise of discretion at an earlier informal parole review hearing (Brief of Petitioners, page 9). If this practice has been valid under Nebraska law then the construction by the Court of Appeals of Nebraska Revised Statutes, section 83-1, 114 (App., p. 8) is incorrect, and the decision of the Court of Appeals to abolish parole review hearings is a clear abridgement of a state prerogative reserved under the Tenth Amendment.

For all of the above reasons we submit that the Due Process Clause of the Fourteenth Amendment should not be deemed implicated by state administrative parole release proceedings which involve only an inmate's expectation and not a legitimate claim of entitlement to parole release in advance of the hearing.

If Due Process Applies Only Rudimentary Process Should Be Due.

Mr. Justice Stevens' dissenting opinion in *Scott v. Kentucky State Board of Parole*, 429 U.S. 60, 61 n. 1 (1976), emphasizes that extensive litigation has developed in the federal courts, with varying results, not only about whether due process applies but also about what process is due.

A determination by this Court that due process applies would not reduce extensive federal litigation with varying results unless all the minimum requirements of due process are also specified. If due process is to apply at parole release proceedings, it should be restricted to some rudimentary form far short of that necessary in a criminal trial, or other adversary proceeding, and less also than the process due at parole revocation proceedings where the private interest at stake is greater and the administrative burdens are less. The administrative burdens at parole release proceedings, which occur inside prisons, are similar to the burdens recognized by the Court in *Wolff v. McDonnell, supra,* 418 U.S. 539, 560-563 (1974).

The differences between parole revocation and parole granting closely parallel the distinctions between dismissal of a student for failure to meet academic standards and dismissal for violation of valid rules of conduct which were recently before this Court in *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78, 86 n. 3 (1978):

> "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.[3]

"[3] . . . . We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment."

The nature of parole consideration is no less evaluative, and the interests of the states in preserving their present frameworks for evaluation of parole release are no less historically supported than the interests of the school in *Horowitz*.

CONCLUSION

The judgment of the court of appeals should be reversed and the matter should be remanded with directions that the action be dismissed because the Due Process Clause of the Fourteenth Amendment to the United States Constitution is not implicated by state administrative parole release proceedings.

Dated: November 16, 1978.

Respectfully submitted,

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